# APPENDIX A

## UNITED STATES COURT OF APPEALS
## FIFTH CIRCUIT

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Nos. 98-60495, 98-60642 and 98-60804

CENTRAL AND SOUTH WEST SERVICES, INC.; ENTERGY SERVICES INC.; MISSISSIPPI POWER COMPANY; UTILITY SOLID WASTE ACTIVITIES GROUP,

*Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondent*.

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GENERAL ELECTRIC COMPANY,

*Petitioner*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondent*.

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SIERRA CLUB, A NON-PROFIT CALIFORNIA CORPORATION,

*Petitioner*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondent*.

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Aug. 15, 2000.

Revised Nov. 13, 2000

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Petition for Review of Regulations of the United States Environmental Protection Agency.

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Before DAVIS, CYNTHIA HOLCOMB HALL* and SMITH, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioners challenge the Environmental Protection Agency's ("EPA") final "Mega Rule" ("Final Rule") concerning the use and disposal of polychlorinated biphenyls ("PCBs"). Petitioners Central and South West Services, Inc., Entergy Services Inc., Mississippi Power Company, Utility Solid Waste Activities Group (collectively "USWAG") and General Electric Co. ("GE") argue that discrete portions of EPA's Final Rule are too restrictive. Petitioner Sierra Club argues that certain provisions of the Final Rule do not sufficiently restrict the use of PCBs. For the reasons that follow, we dismiss, or remand Petitioners's challenges to the Final Rule.

## I

## Facts and Procedural History

In 1976, Congress enacted the Toxic Substances Control Act ("TSCA"), directing EPA to control the manufacture, processing, distribution, use and disposal of chemical substances and mixtures. 15 U.S.C. § 2601 *et seq.* Congress enacted TSCA "to set in place a comprehensive national scheme to protect humans and the environment from the dangers of toxic substances." *Rollins Environmental Services, Inc. v. St. James Parish*, 775 F.2d 627, 632 (5th Cir.1985). Section 6(e) of TSCA generally phased out the manufacture, processing, commercial distribution and use of a certain class of chemicals known as PCBs. 15 U.S.C. § 2605(e).

PCBs are a class of compounds that were manufactured for a variety of purposes, including cooling and lubricating

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* Circuit Judge of the Ninth Circuit, sitting by designation.

transformers, capacitors and other electrical equipment. PCBs are particularly useful for these purposes because they do not burn easily and are excellent insulators. Monsanto Corp., the U.S. manufacturer of PCBs, produced PCBs between 1930 and 1977. PCBs are also produced as a by-product in the production of various organic chemicals. The most recent EPA study on PCBs states that "PCBs are highly likely to pose a risk of cancer to humans." PCBs: Cancer Dose-Response Assessment and Application to Environmental Mixtures, September 1996, ("1996 Reassessment").

TSCA permits EPA to issue rules authorizing certain uses of PCBs, but only if the agency finds that such use "will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2)(B). Section 6(e) also requires the Administrator to "promulgate rules to . . . prescribe methods for the disposal of [PCBs]." 15 U.S.C. § 2605(e)(1)(A).

Pursuant to these statutory directions, EPA in 1991 initiated rulemaking proceedings on what would become the "PCB Mega Rule." EPA initiated this rulemaking for several reasons. First, EPA's knowledge about the sources, uses, risks, and disposal of PCBs had increased substantially in the years following promulgation of the first disposal regulations. 56 Fed.Reg. at 26,738 (June 10, 1991). Second, the regulated community and the public brought to EPA's attention a number of ways to streamline PCB regulations and to better protect human health and the environment from the risks associated with PCBs. 59 Fed.Reg. at 62,788 (Dec. 6, 1994). Third, fourteen years after the ban on manufacturing, over eight hundred thousand tons of PCBs were still being disposed of each year in the United States. 61 Fed.Reg. at 11,096 (Mar. 18, 1996). EPA was particularly concerned about "large volume PCB wastes" from the shredding of

automobiles, appliances, and the like and also PCB-contaminated soils and sediments. 59 Fed.Reg. at 62,791.

In June 1991, EPA published an Advance Notice of Proposed Rulemaking ("ANPR"), which sought comment on a number of sweeping changes to the PCB regulations. 56 Fed.Reg. at 26,738 (June 10, 1991). After receiving comments on the ANPR, EPA published a Notice of Proposed Rulemaking ("NPRM"), proposing amendments to, among other things, controls on the use and storage of PCB-containing electrical equipment and disposal and cleanup of PCBs. 59 Fed.Reg. at 62,788 (Dec. 6, 1994). EPA received over 200 comments on the NPRM and held a public hearing on the NPRM in June 1995.

In June 1998, approximately three-and-a-half years after the NPRM and seven years after the ANPR, EPA promulgated the final PCB Mega Rule ("Final Rule") (codified at 40 C.F.R. §§ 761.1—.398), adopting significant amendments affecting the use, manufacture, processing, distribution in commerce, and disposal of PCBs. 63 Fed.Reg. at 35,384 (June 29, 1998).

Two sets of petitioners, USWAG and GE, challenge discrete aspects of the Final Rule, arguing essentially that the revisions do not go far enough in relaxing regulatory controls on PCB storage and disposal. In the third petition, Sierra Club argues that the rule goes too far and thus allows unreasonably risky disposal practices. This Court has jurisdiction to review challenges to the Final Rule pursuant to Section 19(a) of TSCA, 15 U.S.C. § 2618(a), which grants interested parties the right to appeal directly a final rule promulgated under section 6(e) to this or any other regional circuit court of appeals. We consider each of the petitioners' arguments in turn.

## II

### Standard of Review

TSCA states that the Administrative Procedure Act's scope of review provision, 5 U.S.C. § 706, shall apply to review of rules under TSCA section 6(e) except that "the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by *substantial evidence* in the rulemaking record . . . taken as a whole." TSCA § 19(c)(1)(B)(i); 15 U.S.C. § 2618(c)(1)(B)(i)(emphasis added).

The substantial evidence standard requires reviewing courts "to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.' " *Dickinson v. Zurko*, 527 U.S. 150, 162, 119 S.Ct. 1816, 1823, 144 L.Ed.2d 143 (1999) (citations omitted). "Substantial evidence requires 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213 (5th Cir.1991)(quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)). As this Court emphasized, "Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize [EPA's] actions more closely than an arbitrary and capricious standard would allow." *Id.* at 1214.

Moreover, when EPA seeks to change its regulatory course, it bears the burden of producing evidence in the record supporting the change in its rules. *Center for Science in Public Interest v. Dept. of Treasury*, 797 F.2d 995, 999 (D.C.Cir.1986) (citation omitted)(the agency bears "the burden . . . to justify the change from the status quo. . . ."). And, "[i]t is axiomatic that an agency choosing to alter its

regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.' " *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C.Cir.1987) (citations omitted); *accord Acadian Gas Pipeline Sys. v. F.E.R.C.*, 878 F.2d 865, 870 (5th Cir.1989); *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C.Cir.1983) (agency rescinding rule must "explain why the old regulation is no longer desirable"). "When an agency acts to rescind a standard it previously adopted, a reviewing court will subject that rescission to the same level of scrutiny applicable to the agency's original promulgation." *Association of Public-Safety Comm. Officials-Int'l, Inc. v. F.C.C.*, 76 F.3d 395, 398 (D.C.Cir.1996)(citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

The parties disagree as to how the substantial evidence standard applies to the rulemaking at issue. According to EPA, the unique feature of TSCA § 6(e), which generally prohibits the manufacture or use of PCBs unless EPA has authorized a use, reflects a legislative finding that PCBs pose an unreasonable risk of injury to health. Therefore, EPA argues, TSCA § 6(e) creates a rebuttable presumption that all uses of PCBs present an unreasonable risk of injury to health and the environment. Thus, according to EPA, if a petitioner, such as USWAG or GE, alleges that EPA unreasonably refused to allow a particular use of PCBs, EPA need not show by substantial evidence that petitioners' desired use poses an unreasonable risk to health or the environment. We agree.

When considered in the context of section 6(e), the review provision of TSCA § 19(c)(1)(B)(i) reflects Congress's intent that courts apply the higher substantial evidence standard of review only to those EPA decisions *permitting* the use of PCBs. Section 6(e) establishes a categorical ban on most uses

of PCBs except as authorized by EPA. Although this section permits EPA to craft exceptions to this outright ban, it does not require the agency to do so. Section 19(c)(1)(B)(i), in turn, ensures that when EPA does exercise its discretion to create an exception, it does so only to the extent supported by substantial evidence. Nothing in the statutory scheme suggests that EPA must support by substantial evidence either its decision not to act or its decision not to craft as large an exemption as petitioners would like. Petitioner may nevertheless challenge such a decision, or indecision as the case may be, but they must do so as most petitioners do in most informal rulemakings, by showing that the agency acted arbitrarily and capriciously. *See* 5 U.S.C. § 706(2)(A). To require a greater evidentiary showing by EPA would eviscerate the categorical ban of section 6(e) and would reverse the presumption against PCB use that the section imposes.

Petitioner, USWAG, contends that the D.C. Circuit in *Environmental Defense Fund, Inc. v. EPA*, ("*EDF*") 636 F.2d 1267 (D.C.Cir.1980), held that TSCA does not create a statutory presumption that the use of PCBs presents an unreasonable risk of injury to health or the environment. Petitioner's reliance on *EDF* is misplaced. In *EDF*, petitioners argued that TSCA prohibited EPA from permitting most uses of PCBs under any circumstance. 636 F.2d at 1275 n. 17. In effect, the petitioner argued that the statute created an unrebuttable presumption that PCBs pose an unreasonable risk to health and the environment and that, therefore, EPA could not authorize the use of PCBs. In rejecting this argument, the D.C. Circuit held that the statute does not create an *unrebuttable* presumption. *Id.* We agree with this conclusion and, as indicated above, we conclude that the statutory language creates a rebuttable presumption that uses of PCBs pose an unreasonable risk to health and the environment.

Accordingly, we hold that the substantial evidence standard of review provided for under section 19(c)(1)(B)(i) applies only when a petitioner challenges EPA's decision to depart from the outright ban and permit the use or expand the use of PCBs. When a petitioner challenges an EPA rule restricting or prohibiting the use of PCBs, courts must review EPA's action under the arbitrary and capricious standard of review.

## III

## USWAG Petition

USWAG first challenges a provision of the preamble to the Final Rule that states that TSCA does not preempt state or local PCB cleanup, storage, and disposal regulations. USWAG also challenges the portion of EPA's Final Rule that imposes restrictions on the storage for reuse of PCB Articles, as well as the section of the Final Rule that creates a regulatory assumption for classifying "small transformers" as "PCB Transformers."

### A

### Federal Preemption

Section 18 of TSCA provides, in pertinent part, that:

> [e]xcept as provided in subsection (b) of this section . . .
>
> . . . if the Administrator prescribes a rule or order under section 2604 or 2605 [TSCA § 6] of this title (*other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title* ) [referred to as the "Parenthetical Exception"] which is applicable to a chemical substance or mixture, and which is designed to protect the environment associated with such substance or mixture, *no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture* . . . unless such requirement (i) is identical to the requirement prescribed

> by the Administrator, (ii) is adopted under authority of the Clean Air Act or any Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

TSCA § 18(a)(2)(B), 15 U.S.C. § 2617(a)(2)(B) (emphasis added).

Thus, once EPA regulates a chemical substance under TSCA § 6, no State or local government may establish or continue to enforce any requirement applicable to such chemical unless: (1) the state requirement fits into one of section 18's three enumerated exceptions, or (2) the state requirement falls within the parenthetical exception to section 18, which exempts rules imposing certain requirements described in TSCA.

USWAG is unhappy with EPA's declaration in the preamble to the Final Rule that "TSCA does not allow the Administrator to preempt State disposal rules which describe the manner or method of disposal of a chemical substance or mixture, or in this instance, the disposal of PCBs." 63 Fed. Reg. at 35,386. USWAG also complains of several provisions of the Final Rule which explain that parties subject to the Final Rule must also comply with other "applicable" Federal, State, and local laws and regulations.[1]

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[1] 40 C.F.R. § 761.50(a)(6) provides that "[a]ny person storing or disposing of PCBs is also responsible for determining and complying with all other applicable Federal, State, and local laws and regulations;" 40 C.F.R. § 761.72(c)(2), that provides "[s]crap metal recovery ovens and smelters disposing of PCBs must provide notification as disposers of PCBs, are not required to submit annual reports, and shall otherwise comply with all applicable provisions of subparts J and K of this part, as well as other applicable Federal, State, and local laws and regulations;" and 40 C.F.R. § 761.79(a)(6), "[a]ny person engaged in decontamination

USWAG argues that the portion of this legally-binding preamble[2] declining to preempt state rules governing the disposal of PCBs contravenes the express intent of Congress to establish a comprehensive and uniform federal PCB regulatory program. Additionally, USWAG argues that the preamble directly conflicts with this Court's controlling precedent in *Rollins*, 775 F.2d at 634 (holding that "Congress has *explicitly* mandated that [TSCA], and regulations promulgated under it by EPA, preempt state and local regulation of PCB disposal.")(emphasis in original). USWAG urges us to vacate EPA's interpretation that TSCA does not preempt state and local regulations regarding the disposal of PCBs.

Before we can reach the merits of USWAG's claims, however, we must consider whether these claims are presently ripe for adjudication. *See Ohio Forestry Ass'n, Inc., v. Sierra Club*, 523 U.S. 726, 731, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998)(case must be ripe in order to be justiciable). The Supreme Court has explained that the essence of the ripeness doctrine is to:

> prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

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under this section is responsible for determining and complying with all other applicable Federal, State, and local laws and regulations."

[2] An EPA declaration contained in the preamble to a final rule setting forth the Agency's final and binding interpretation of the statute qualifies as a reviewable regulation for purposes of judicial review. *Chemical Waste Management v. EPA*, 869 F.2d 1526, 1533 (D.C.Cir.1989) (holding that a regulatory interpretation in preamble to a final rule was ripe for review because EPA had arrived at its ultimate decision on the issue).

> The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

*Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). Typically, in the context of rulemaking, "we wait until a rule has been applied before granting review," however, "this prudential concern loses force . . . when the question presented is purely legal." *American Forest & Paper Ass'n. v. EPA*, 137 F.3d 291, 296-297 (5th Cir.1998) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 587 (5th Cir.1987)("*NOPSI*")). USWAG argues that their challenge involves a pure question of law that is ripe for consideration. This Court has held, however, that even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness. *See American Forest*, 137 F.3d at 296 (holding that purely legal issue was ripe for review because injuries were not speculative and deferring review would impose an immediate, significant burden on the petitioner); *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir.1993) (holding that purely legal issue of whether Rocky Mountain was liable to indemnify Chevron for any plug and abandon obligations was ripe because there was a substantial possibility that Chevron would be required to plug and abandon the wells); *NOPSI*, 833 F.2d at 588 (holding that plaintiffs' suit to enjoin city council from forcing plaintiffs to absorb the cost of a nuclear power plant was not ripe because city council had only announced an inquiry into the issue of who should pay for the power plant and that there was only a possibility of harm to plaintiffs).

In this case, USWAG has identified no State or local regulations that it contends TSCA should preempt. Nor has USWAG offered evidence that it will suffer hardship if we

defer consideration of this issue. Based on this record, we conclude that any hardship that USWAG could suffer is conjectural and thus, the issue is not ripe for review.

B

Storage for Reuse

The Final Rule authorizes members of the regulated industry to store PCB Articles[3] for reuse. 40 C.F.R. § 761.35. Under § 761.35, an owner/operator may store PCB Articles indefinitely in storage units constructed to contain spills or releases of PCBs. 40 C.F.R. § 761.35(c). PCBs may also be stored in any other area if the owner or operator of the PCB Article: (1) follows the use and marking requirements for PCB Articles; (2) maintains records indicating the date the PCB Article was removed from use, the projected location and anticipated use of the PCB Article, and, if applicable, the date the PCB Article is scheduled for repair; and (3) if the owner or operator wants to store the PCB Article for more than five years, he must receive written approval from EPA Regional Administrator for the region in which the PCB Article is stored. 40 C.F.R. §§ 761.35(a) and (b). These restrictions on storage for reuse affect utility companies because, as EPA stated in the NPRM:

> [transformers] can easily have an active service life of more than 40 years [and] disposing of this equipment prematurely based upon an arbitrary time limit would not be economically prudent nor serve any environmental goals. Placing such a piece of electrical equipment in storage for reuse to be used as a spare or in emergency situations is both prudent and economically sound.

59 Fed.Reg. at 62,822.

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[3] "PCB Article" means any manufactured article that contains PCBs or whose surface has been in direct contact with PCBs, such as capacitors, transformers, electric motors, pumps, and pipes. 40 C.F.R. § 761.3.

USWAG argues that EPA previously authorized storage for reuse in its 1982 Rulemaking and that Final Rule § 761.35 imposes new restrictions on the storage for reuse of PCB Articles. According to USWAG, we should vacate § 761.35 because EPA lacks substantial evidence in the record to support its restrictions on the storage for reuse of PCB Articles. In addition, USWAG argues, as an independent basis for vacating § 761.35, that EPA failed to respond to a multitude of comments requesting a national variance for electric utilities.

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1982 Rulemaking

EPA authorized storage for reuse for certain PCB Articles in its 1982 Rulemaking.[4] EPA explains that by 1991 it became aware of risks posed by PCB Articles in storage for reuse that it did not anticipate when it promulgated the 1982 regulations. 56 Fed.Reg. at 26,742. According to EPA, it became aware that regulated entities were engaging in "sham storage," that is, storage of PCB Articles with no intent to reuse the Articles in order to circumvent stringent disposal requirements. *Id.* EPA further contends that it became aware of reports of electrical equipment "held 'in storage' " for prolonged periods of time and "abuses" of the storage for reuse rules by "brokers, junk yards, [and] service shops." 56 Fed.Reg. at 26,742; 59 Fed.Reg. at 62,822.

In the instant rulemaking, EPA received a comment from the State of Connecticut's Department of Environmental Protection that warned "it is clear that . . . some limitations must be imposed on the long-abused 'storage for reuse'

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[4] *See* 47 Fed.Reg. 37,342, 37344 (Aug. 25, 1982). *See also id.* at 37,357 (use conditions for PCB Transformers "in use or stored for reuse") (text of § 761.30(a)(1)(ii)); *id.* at 37,358 (conditions for "use and storage for reuse" of electromagnets, switches, and voltage regulators)(text of § 761.30(h)(1)(I)).

status. . . ." State of Connecticut Comments, R.C1-249 at 3. The Department of Energy ("DOE") also submitted comments indicating the prevalence of abuse of storage for reuse. According to DOE:

> as EPA points out, often equipment stored for "reuse" in junkyards, service shops, brokers, etc. is in disrepair or is damaged. DOE agrees that these specific situations must be eliminated while still allowing legitimate storage for reuse to continue.

Comments of DOE, R.C1-147 at 77.

EPA argues that it imposed the § 761.35 requirements to curb such abuse of the previous "storage for reuse" rule. The record amply supports this decision to strengthen the "storage for reuse" regulations to prevent practices that pose an unreasonable risk to health and the environment. EPA's decision to change its previous storage for reuse authorization was neither arbitrary nor capricious.

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Response to Comments

USWAG also argues that EPA failed to respond to industry comments requesting a national variance from compliance with this rule for electric utilities. Section 553(c) of the EPA requires an agency to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). The scope and degree of detail required by § 553(c) depends on the scope and detail provided in the comments. *See* Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise* § 7.4, at 312 (3d ed.1994).

In the NPRM, EPA specifically requested comments from the regulated community on the appropriateness of a national

variance from the proposed requirements of § 761.35.[5] USWAG argues that we must vacate the restrictions on storage for reuse because EPA failed to respond to fifteen comments specifically requesting a national variance from § 761.35 for electrical utilities.

EPA admits that it did not state explicitly why it declined to grant industry demands for a national exemption for the electric utility industry. However, EPA argues that after considering comments from a number of sources, it evaluated the risks, benefits and burdens associated with the storage for reuse of PCB Articles, and concluded that it could not give the electric utility industry a blanket exemption from § 761.35. EPA also argues that the storage for reuse requirements promulgated in the Final Rule are less rigorous than the storage for reuse requirements proposed in the NPRM and that the Final Rule it adopted was EPA's comprehensive response to all the comments on storage for reuse, including the electric utilities' requests for a national variance. We conclude that EPA's rationale is insufficient.

EPA's specific request for comments on the appropriateness of a national variance and the numerous comments that EPA received on this request required EPA to give reasons for declining to promulgate a national variance. But EPA's failure to explain why it did not adopt a national variance does not require vacatur. Courts have explained that "remand is generally appropriate when 'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.' " *See Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C.Cir.1999)(quoting *Allied-Signal, Inc. v. United States*

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[5] "EPA also requests comment on the inclusion of site-specific or *nationwide exemption* or waiver provisions. . . ." 59 Fed.Reg. at 62,822 (emphasis added).

*Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C.Cir.1993)). EPA may well be able to justify its decision to refuse to promulgate a national variance for the electric utilities and it would be disruptive to vacate a rule that applies to other members of the regulated community.[6] Accordingly, we remand, without vacatur, Final Rule § 761.35 for EPA to provide a reasoned statement of why it did not grant a national variance for the electric utility industry.

## C

## Small Transformers

Another issue that EPA considered in the rulemaking process was the adoption of assumptions for classifying transformers containing PCBs for the purpose of determining how those transformers should be regulated during the time they are in use. 63 Fed.Reg. at 35,436-37. These regulatory assumptions are critical because the applicable controls depend on what category of transformer is being regulated: transformers containing ≥ 500 ppm[7] PCBs are defined as "PCB Transformers" and are subject to the most stringent use controls (including labeling, inspections and registration requirements, as well as location restrictions); transformers containing ≥ 50 to < 500 ppm PCBs are defined as "PCB-contaminated Electrical Equipment" and are subject to less onerous use controls; and transformers containing < 50 ppm PCBs generally are not regulated for purposes of use. 40 C.F.R. §§ 761.3 and 761.30(a).

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[6] The Rule regulating storage for reuse applies to all members of the regulated community including junkyards, service shops, brokers, and electric utilities. EPA gave ample reasons for its application of the Rule to the members of the regulated community in general. It simply failed to explain why it refused to grant the national variance to the electric utilities. We conclude that it would be disruptive to vacate application of the Rule to other segments of the industry.

[7] ppm = parts per million.

In NPRM, EPA requested comment on how to classify, for purposes of the above regulatory assumptions, a particular category of transformers characterized as "small transformers":

> [t]he Agency is seeking information regarding numbers of small transformers or other electrical equipment that contains PCBs. . . . Some examples of this type of equipment are: potential transformers, current transformers. . . . These small transformers can range in size from several inches to several feet in height. . . . Since these smaller transformers generally do not have a nameplate, under the proposed amendment to § 761.3 [the definition of "PCB Transformer"] they *would have to be assumed* to be PCB Transformers and would be subject to the [PCB Transformer] use requirements . . . and the disposal requirements. . . .
>
> The Agency is also soliciting comments regarding the disposal requirements that could be imposed on these small transformers or other similar types of small electrical equipment.

59 Fed.Reg. at 62,820 (emphasis added).

In response to this request for information, USWAG and others submitted comments explaining why EPA should not include "small transformers" within the regulatory assumption rule for "PCB Transformers." In addition to providing EPA with information on the uses and manufacture of the various types of "small transformers," USWAG provided EPA with the results of an electric utility industry survey. This survey challenged EPA's factual basis for concluding that the millions of "small transformers" in use throughout the electric utility industry are "PCB Transformers" (i.e., contain ≥ 500 ppm PCBs). Only one percent (1%) of the small transformers evaluated in the survey were found to meet the definition of a "PCB

Transformer." However, USWAG did not provide EPA with the data supporting the survey results and, therefore, that data is not part of the rulemaking record.

On the basis of the survey results, USWAG urged EPA not to include "small transformers" within the regulatory assumption rule that would classify them as "PCB Transformers." Instead, USWAG urged EPA to include "small transformers" within the regulatory assumption rule for PCB-Contaminated Electrical Equipment.[8] USWAG also requested that EPA regulate small transformers containing less than three pounds of fluid in the same manner as Small Capacitors (which are essentially viewed as non-PCB equipment) and that EPA view "dry-type" small transformers as non-PCB and thus exempt from PCB controls.

In the Final Rule, EPA concluded that the following transformers could be assumed to contain less than 50 ppm PCBs (and hence not subject to any PCB controls during use): (1) non-liquid filled transformers; (2) transformers containing less than 3 pounds of fluid; (3) transformers manufactured on or after July 2, 1979, the effective date of TSCA's PCB ban; (4) certain mineral oil transformers of any volume; and (5) pad-mounted and pole-top transformers. 40 C.F.R. §§ 761.2(a)(1)-(4). However, the rule assumes that "small transformers" and other transformers that meet the

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[8] The regulatory assumptions apply only to untested equipment. An owner of PCB-containing electrical equipment can establish the actual PCB concentration in the equipment, either through testing or the use of qualified documentation, and not rely on the regulatory assumptions. 63 Fed.Reg. at 35,389. However, as USWAG points out in their comments, most "small transformers" are hermetically sealed during manufacture, making testing impossible without destroying the integrity of the unit. Pet. Comments at 62. Hence, most owners/operators of "small transformers" must, as a practical matter, rely on the regulatory assumptions for purposes of classifying this equipment.

§ 761.2(a)(3) criteria,[9] are "PCB Transformers." In support of this conclusion, EPA reasoned that it is exceedingly difficult to determine the contents and date of manufacture of these small transformers.

USWAG argues that neither EPA's Final Rule nor its Response to Comments discusses or challenges the validity of the survey results supplied by USWAG or the data in other comments demonstrating that less than 1% of "small transformers" contain > 500 ppm PCBs.

EPA argues that as a result of comments by USWAG and others it modified the proposed assumption extensively to reflect these comments. EPA argues that it did not further modify the assumption because, when taken together, EPA's evidence of the dangers that PCBs pose, the large number of PCB Transformers manufactured that contain high levels of PCBs, and the improper practices of some transformer owners[10] and operators support the promulgation of the assumption rule.

We conclude that EPA's decision not to exclude the transformers identified by USWAG in its survey from the assumption rule was not arbitrary and capricious. USWAG did not introduce into the record the data supporting its survey and there was no other evidence in the record that

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[9] Section 761.2(a)(3) provides that:

> [a]ny person must assume that a transformer manufactured prior to July 2, 1979, that contains . . . 3 pounds . . . or more of fluid other than mineral oil and whose PCB concentration is not established, is a PCB Transformer (i.e., > 500 ppm). If the date of manufacture and the type of dielectric fluid is unknown, any person must assume the transformer to be a PCB Transformer.

[10] According to EPA, it uncovered evidence that some transformer owners removed the manufacturer's nameplate, which generally provides the only evidence of the level of PCBs in the transformer, from PCB transformers to avoid properly disposing them. 56 Fed.Reg. at 26,741.

could support a conclusion that the types of small transformers surveyed by USWAG should not be classified as PCB Transformers.

## IV

## GE Petition

GE argues that EPA, in promulgating the Final Rule, overestimated the carcinogenicity of PCBs. GE also challenges the Final Rule's provisions regarding the decontamination of painted metal surfaces and concrete.

### A

### PCB Risk Assumption

The TSCA requires that any EPA rule concerning PCBs must not cause an "unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(1)(A), (2)(B). Pursuant to this requirement, the Final Rule establishes new PCB remediation and decontamination options based on: (1) EPA's estimate of the toxicity of PCBs; and (2) EPA's estimate of the frequency, duration and extent of human exposure to PCBs. *See* 63 Fed.Reg. 35,384, 35,385; U.S. E.P.A., *Assessment of Risks Associated with the PCB Disposal Amendments* (Versa, May 11, 1998). To define the toxicity of PCBs, EPA used a numerical estimate of the cancer potency of PCBs (often called "cancer potency factor" or "C.F.") of 4.0 $(mg/kg/day)^{-1}$.[11] 63 Fed.Reg. at 35,386.

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[11] To assess the risk of acquiring cancer (as opposed to a non- cancer health effect) from exposure to a substance, EPA uses a risk assessment method based on a non-linear model. The C.F. expresses the carcinogenic potential of the substance in question; the higher the value, the more likely the substance is to cause cancer at any particular dose level. When EPA published the PCB Spill Cleanup Policy, 52 Fed.Reg. 10,688, 10,696 (Apr. 2, 1987), the agency used a C.F. of 4.0 $(mg/kg/day)^{-1}$ to develop the risk-based standards which formed the basis of the Proposed Rule. EPA subsequently issued a new assessment of the cancer risk from

GE argues that in setting the risk-based standards, EPA overestimated the health risk posed by PCBs. According to GE, the record does not support EPA's use of the C.F. of 4.0 $(mg/kg/day)^{-1}$, and contends that the appropriate C.F. for PCBs is less than 2.0 $(mg/kg/day)^{-1}$.

EPA counters that TSCA permits it to consider other factors such as unknown threats to human health or the environment. According to EPA, it raised the C.F. from the range of 0.1 to 2.0 $(mg/kg/day)^{-1}$ to 4.0 $(mg/kg/day)^{-1}$ in order to protect against non-cancer and environmental risks. In its Response to Comments, EPA states that:

> while the 4.0 $(mg/kg/day)^{-1}$ slope factor does not correspond with any of the cancer slope factors in the September 1996 report [the Reassessment], it does allow for additional protection from as yet unquantified risks from non-cancer human health effects and effects to the environment.

U.S. E.P.A., *Response to Comments Document on the Proposed Rule—Disposal of Polychlorinated Biphenyls* (May 1998).

EPA is in the process of conducting a comprehensive assessment of the non-cancer toxic effects of PCBs.[12] According to EPA, it promulgated the Final Rule before the assessment was completed, in order to comply with the desires of the regulated community to finalize the rulemaking as soon as possible. However, EPA states that it has already committed to reexamine the toxicity of PCBs and has no objection to a remand so that it can consider the results of the

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exposure to PCBs that indicated that the upper bound C.F. that would be appropriate for assessing cancer risk from PCBs was 2.0 $(mg/kg/day)^{-1}$. 1996 Reassessment.

[12] According to EPA the assessment of the health effects of PCBs will be completed by fiscal year 2000 or 2001. 65 Fed.Reg. 1863.

assessment. Therefore, we remand §§ 761.61(a) and 761.79(b) to give EPA an opportunity to complete its assessment and reconsider the Final Rule in light of its study.[13]

B

Decontamination of PCB-Contaminated Equipment and Structures for Distribution or Use in Commerce

The Final Rule prohibits the distribution in commerce of any equipment or structures that have been contaminated with PCBs in excess of 50 ppm. 40 C.F.R. § 761.20(c)(5). The Final Rule also prohibits the use of equipment or structures that have been contaminated with PCBs in excess of 50 ppm. 40 C.F.R. § 761.30(u). The rule provides a single exception to these prohibitions where the equipment or structures have been decontaminated in accordance with Final Rule § 761.79. GE contends that we should vacate the Final Rule's stringent procedures for decontaminating equipment and structures contaminated by PCBs because they are not supported by substantial evidence in the record and because EPA failed to abide by the notice and comment requirements.

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[13] GE further argues that, as a condition on the remand, we should direct that the remand be completed and a new rule be promulgated within three years of the mandate issuing in this case. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579, 590 (5th Cir.1981)(holding that "[i]n hearing a petition for review, a court of appeals may exercise equitable powers in its choice of remedy, as long as the court remains within the bounds of statute and does not intrude into the administrative province."). GE does not cite any cases in which a court, through an exercise of its equitable powers, imposed such a time limit on remand. Although we recognize that the PCB Mega-Rulemaking was an arduous seven-year affair and that GE will not obtain full relief until EPA completes further rulemaking on the cancer risk presented by PCBs, we decline to impose particular time limits in this area of activity within the province of the Executive Branch. If, following the remand, GE believes that EPA is unduly delaying the promulgation of a new rule, it may seek a writ of mandamus compelling EPA to expedite its rulemaking.

1

Decontamination of Painted Surfaces

The Final Rule states that painted metal surfaces contaminated by spills ≥ 50 ppm are considered to be "decontaminated" if the paint is removed to Visual Standard No.2, Near-White Blast Cleaned Surface Finish, of the National Association of Corrosion Engineers ("NACE").[14] 40 C.F.R. § 761.79(b)(3)(i)(B). GE argues that EPA, in enacting this provision, violated the notice and comment requirements of the APA by failing to mention the NACE standard in any preamble or proposed regulatory language, which had the effect of preventing potential comment on that standard.

a

Notice and Comment

The record reflects that despite GE's protestations to the contrary, it had ample opportunity to comment on the requirements for decontaminating porous surfaces. GE submitted two sets of comments calling for EPA to allow the decontamination of porous surfaces and offering suggestions for methods of decontamination. Its suggestions included blasting, scarification, and removal with solvents and abrasives, *GE Comments*, C1-242, at 77-80, and C1-303, at 20. These and other comments demonstrate that GE knew that EPA was likely to consider a wide range of decontamination options for porous surfaces. Because GE had knowledge of the problem EPA was attempting to solve and had full opportunity to comment on the solution to the problem, GE fails to expose any violation of EPA's notice and comment requirements.

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[14] The NACE standard is a "Visual Standard for Surfaces of New Steel Centrifugally Blast Cleaned with Steel Grit and Shot."

b

Arbitrary and Capricious

GE argues that Final Rule § 761.79(b)(3)(i)(B) is not supported by substantial evidence because: (1) there is no substantial evidence showing that EPA should require paint removal for decontamination, and (2) while the NACE standard adopted by EPA is tailored to a specific cleaning technology, no evidence in the record suggests that the cleaning methods authorized by EPA can be used to satisfy NACE.

According to GE, EPA's PCB Spill Policy ("Spill Policy") previously defined painted surfaces as "impervious," and allowed contaminated paint to be decontaminated by surface wiping.[15] 52 Fed.Reg. 10,705 (Apr. 2, 1987). GE contends there is no evidence in the record to support EPA's recent classification of painted metal surfaces as "porous," and requiring complete removal of contaminated paint. However, there is no evidence in the record that suggests that paint is not porous to spills of liquid PCBs and EPA provides a sensible explanation for the rule change.[16] As such, we reject GE's argument that the painted metal surface provision of § 761.79(b)(3)(I)(B) must be vacated because EPA's requirement that PCB contaminated paint be removed is not arbitrary and capricious.

According to GE, compliance with the visual NACE standard cannot be achieved by using the cleaning methods authorized by EPA in the Final Rule. See 40 C.F.R.

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[15] Under the PCB Spill Policy recently discovered contaminated painted surfaces could be decontaminated by wiping the paint so that the surface contamination was less than 10 $\mu g/100\ cm^2$.

[16] EPA argues that the Spill Policy was badly phrased in that it allowed the industry to use the wipe test on old spills that were recently discovered. EPA was persuaded that in these situations the wipe test was inadequate to remove PCBs after they had penetrated the paint.

§ 761.79(b) (authorizing *inter alia* chopping, scraping, scarification, or the use of abrasives or solvents). GE argues that the Final Rule effectively requires it to blast its contaminated equipment with grit/steel shot which will either destroy or severely diminish the economic value of the machines and eliminate the option of distributing the equipment in commerce for continued use.

Contrary to GE's assertion, EPA does not interpret the rule in a manner that would require GE to use grit/steel shot cleaning methods. Rather, as EPA explains, parties can meet the standard by using the cleaning methods authorized in the Final Rule so long as the metal surface is left free of foreign matter except for light shadows or streaks. Because the Final Rule does not require paint to be removed by blasting the contaminated surface with grit/steel shot, we conclude that it is not arbitrary and capricious.

2

Concrete

The Final Rule allows an owner to use, but not distribute in commerce, concrete on which PCBs ≥ 50 ppm have been spilled. But this use is subject to a number of conditions.[17] First, the owner must clean accessible surfaces. 40 C.F.R. § 761.30(p)(ii). After cleaning, the owner must then coat the surfaces and place signs warning of the presence of PCBs. 40 C.F.R. § 761.30(p)(iii)(A), (B). These post-cleaning conditions apply regardless of the residual level of PCB contamination in or on the concrete. For example, if concrete is cleaned to a level below the 10 Sg/100 $cm^2$, the owner must still coat the concrete and mark it as PCB-contaminated.

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[17] If the cleanup begins within 72 hours of the spill and the 10 $\mu$g/100 $cm^2$ level is reached, then the concrete can be used without restrictions. 40 C.F.R. § 761.30(u). 10 Sg/Liter = 10 micrograms per Liter.

GE argues that Final Rule § 761.30(p)(1)(iii) requires regulated entities to coat and mark concrete to a level below that which EPA has agreed does not pose a substantial risk of injury. Consequently, GE contends the record does not support such stringent cleaning requirements. GE also argues that this cleaning requirement contradicts EPA's long-standing Spill Policy, which does not impose such requirements if concrete is cleaned to the 10 $\mu g/100\ cm^2$ level.

EPA counters that the 10 $\mu g/100\ cm^2$ requirement measures only the surface concentration of PCBs; not the amount of PCBs that have soaked into a porous material. Surface cleaning of porous surfaces such as concrete will not clean up PCB spills that have soaked into the concrete. Therefore, as explained in the Final Rule, EPA requires that parties not only clean the spill area's surface, but also coat and mark it in order to warn of possible deeper PCB contamination in the material. 63 Fed.Reg. at 35,398 ("EPA believes that the use conditions specified in § 761.30(p) will effectively prevent exposure to any residual PCBs in the contaminated porous material and therefore continued use of this material will not present an unreasonable risk.").

The record shows without contradiction that the decontamination of concrete poses particular challenges because of its porousness. Moreover, several commentors, including GE, commented that encapsulation (i.e. covering contaminated concrete with fresh concrete and/or a sealant) is a feasible means of preventing "wicking back" of PCBs to the surface. *GE Comments*, R.C1-034, at 31; *American Electric Power Comments*, C1-029, at 15; *Tenneco Gas Comments*, C1-154, at 63. Our review of the record leads us to conclude that EPA's cleaning, painting and marking requirements are not arbitrary and capricious.

## V

### Sierra Club Petition

In its petition, Sierra Club challenges EPA's promulgation of several sections of the Final Rule relating to the disposal of PCB bulk product waste.[18] Specifically, Sierra Club argues that: (1) EPA failed to provide notice and an opportunity for comment on Final Rule § 761.62(d), which permits the disposal of "PCB bulk product waste" as daily landfill cover and under asphalt road beds; (2) EPA failed to provide notice and an opportunity for comment on Final Rule § 761.62(b), which allows disposal of PCB bulk product waste in ordinary landfills regardless of the PCB concentration in the waste; (3) that Final Rule § 761.62(b)(1)(i)'s assumption that PCB bulk waste product does not leach is not supported by substantial evidence; (4) that Final Rule § 761.62(b)(1)(ii)'s adoption of a water-based leachability test is not supported by substantial evidence. Essentially, Sierra Club challenges the Final Rule's assumption that PCB bulk product waste does not leach PCBs and, accordingly, it is permissible to allow the disposal of PCB bulk product waste in landfills and under asphalt as roadbed. Before we can reach the merits of Sierra Club's petition, however, we must consider whether it has standing.

An association has standing to bring a suit on behalf of its members when: (1) its members would otherwise have

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[18] PCB bulk product waste includes:

> [p]lastics (such as plastic insulation from wire or cable; radio, television and computer casings; vehicle parts; or furniture laminates); preformed or molded rubber parts and components; applied dried paints, varnishes, waxes or other similar coatings or sealants; caulking; Galbestos; non-liquid building demolition debris; or non-liquid PCB bulk product waste from the shredding of automobiles or household appliances from which PCB small capacitors have been removed (shredder fluff).

Final Rule § 761.62(b)(1)(i).

standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Texans United For a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir., 2000). The individual plaintiffs can satisfy their "irreducible constitutional minimum" of standing by demonstrating that: (1) they have suffered an actual or threatened injury; (2) the injury is "fairly traceable" to the defendant's action; and (3) the injury will likely be redressed if the plaintiffs prevail in the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *Texans United*, 207 F.3d at 792.

Sierra Club's challenge to EPA's rulemaking centers around the TSCA's procedural requirements that EPA provide notice and an opportunity to comment on proposed rules. Such a challenge to EPA's purported failure to abide by a procedural requirement in rulemaking is analyzed under the somewhat more lenient requirements of standing for procedural rights cases. *See Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664-65 (holding that petitioners' standing in challenging IRS's rulemaking, in which IRS promulgated a tax credit for gasoline additives without preparing an environmental impact, is determined in accordance with "procedural-rights" line of cases deriving from *Lujan* ). In *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir.1998), we outlined the standing requirements for a plaintiff seeking redress for violations of procedural rights:

> in a procedural rights case . . . a plaintiff is not held to the normal standards for redressibility and immediacy. This does not mean, however, that a procedural rights plaintiff has standing merely because of the

> government's failure to comply with the relevant procedural requirements. Instead, the plaintiff must show an injury that is both concrete and particular, as opposed to an undifferentiated interest in the proper application of the law.

*Id.* at 613.

Sierra Club argues that EPA's failure both to provide notice and comment in the promulgation of Final Rule §§ 761.62(b) and (d) and to support Final Rule §§ 761.62(b)(1)(i) and (ii) with substantial evidence will result in injury to the health, environmental and recreational interests of Sierra Club members. According to Sierra Club, the Final Rule creates a risk that PCBs will leach from bulk product wastes in either landfills or roadbeds and contaminate water supplies. Sierra Club further contends that the use of PCB bulk product waste as daily landfill cover will result in a contamination of the ambient air with PCBs. To establish this injury in fact, Sierra Club relies on the affidavits of two Sierra Club Members, Dr. Neil Carman (" Dr. Carman") and Martha Sinclair ("Sinclair") (collectively "Affiants").

In his affidavit, Dr. Carman claims that he will sustain injuries because the Final Rule allows the disposal of PCB bulk product waste as landfill and as roadbed. Dr. Carman states that "the landfill used by [his] town does not have an impermeable underlayer to prevent the migration of contaminants offsite." Thus, the practices of disposing of PCB bulk product waste and using PCB bulk product waste as daily cover pose "a significant risk of PCB contamination to [his] neighborhood and his town's water supply." Dr. Carman also expressed a concern that:

> if PCB contaminated road bed material was used in the reconstruction of Routes 71 and 290 West as well as south MOPAC, those roads cross over the Edwards aquifer that in turn supplies drinking water to the City of Austin through significant flows into the Colorado

> River. I and my family also frequently swim at the Barton Springs pool that is fed directly by this aquifer. Because the asphalt road cover on our roads regularly allows water to enter the underlying road bed material through cracks, heaves and the many, omnipresent potholes, PCBs could leach from the roadbed material into Barton Springs and the City of Austin's water supply.

In her affidavit, Sinclair states, that she regularly travels on roads that are subject to being repaired or replaced with asphalt. According to Sinclair:

> I . . . would be at risk for exposure to PCBs released into the air if PCB waste is transported to road construction areas, and stored at road construction areas in heaps or in trucks. I am also at risk in breathing dust released during road construction. PCB contaminants could also enter the waters I use for recreation and drinking when washed during rainfall and flood events from road construction sites to the Ohio River and other surface waters. The Ohio River serves as a drinking water source and a fisheries providing additional routes of PCB exposure for Ohioans including me.

She also contends that disposal of PCB bulk wastes in landfills poses a potential risk to landfill workers and contractors. However, a party may not base its Article III standing on alleged injuries to others. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,—U.S.—120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000); *Lujan* 504 U.S. at 578, 112 S.Ct. at 2146. Accordingly, we consider only Carman and Sinclair's claims of injury to themselves.

A

Leach from Landfill

Under the Final Rule, PCB bulk product waste is presumed to leach at levels less than the PCB leachate limit of

10 μg/liter. Thus, PCB bulk product waste may be disposed of irrespective of its actual concentration of PCBs.

Sierra Club argues that the leach test, used by EPA to determine that PCB bulk product waste leaches under the 10 μg/liter limit, is flawed because it does not properly simulate conditions that contain organic solvents, such as toluene and acetone. According to Sierra Club, these organic solvents cause PCB bulk product waste to leach at levels higher than 10 Sg/liter. Therefore, Sierra Club argues that PCB bulk product waste disposed of in landfills will leach into the ground below landfills, at levels significantly higher than 10 μg/Liter and contaminate the environment.

Dr. Carman alleges that PCB bulk product waste disposed of in his town's landfill may leach from the landfill and somehow enter the town's water supply. But Carman presents no facts to support this concern. He produced no facts establishing the relative location of the landfill and the aquifer so that it is purely conjectural that PCB's could leach from the landfill and contaminate his town's water supply. This subjective concern, therefore, cannot serve as the basis for Sierra Club's standing. As the Supreme Court has explained, "[s]tanding is not an ingenious academic exercise in the conceivable, but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm." *Lujan*, 504 U.S. at 556, 112 S.Ct. at 2139.

This court and the Supreme Court have consistently held that, in order to establish Article III standing, petitioner must "have a direct stake in the outcome." *See Sierra Club v. Cedar Point Oil Company, Inc.*, 73 F.3d 546, 555-56 (5th Cir.1996); *see also Friends of the Earth*, 120 S.Ct. at 705. Moreover, "[i]t is the reality of the threat of [impending] injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Los Angeles v. Lyons*, 461 U.S. 95, 107, n.8, 103 S.Ct. 1660, 1668, 75 L.Ed.2d 675 (1983). In *Friends of the Earth*, for example, petitioner sued

Laidlaw under the Clean Water Act for discharging pollutants into a river in excess of permit limits. —U.S.—, 120 S.Ct. at 702. Petitioner's members testified *inter alia* that they had used the river for recreational activities in the past and that, but for Laidlaw's discharge of pollutants, they would continue to use the river. *Id.* at 704-05. The Supreme Court held that petitioner had stated an injury in fact because "the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, *directly* affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 705 (emphasis added). Similarly, in *Cedar Point Oil*, 73 F.3d at 546, this court held that Sierra Club had established an injury in fact where its members testified that Cedar Point's discharge of pollutants into Galveston Bay would directly impair their enjoyment of recreational activities on the Bay. *Id.* at 555-56.

Unlike the petitioners in *Friends of the Earth* and *Cedar Point Oil*, Dr. Carman fails to establish any direct harm. While the petitioners in *Friends of the Earth* and *Cedar Point Oil* presented uncontroverted evidence that the pollutants they were challenging had entered the waterways that they enjoyed, Carman has not established the possibility that PCB bulk product wastes disposed of in his town's landfill could contaminate the aquifer that supplies his drinking water. As such, Dr. Carman has not identified a concrete injury sufficient to confer Article III standing. *See Lujan*, 504 U.S. at 566, 112 S.Ct. at 2139 ("standing . . . requires, at the summary judgment stage, a factual showing of perceptible harm.").

B

Roadbed

Sierra Club's challenge to provisions in the Final Rule that allow disposal of PCB bulk product waste as roadbed

material rests primarily on concerns that PCBs will leach from PCB bulk product waste disposed of in landfills. Again, Sierra Club has failed to produce facts that establish the requisite injury in fact.

Dr. Carman's theory of injury is predicated upon the occurrence of a string of future hypotheticals—that road construction will occur in proximity to the Edwards aquifer, that the construction crews will use PCB bulk product waste in the roadbed, that PCBs will leach from the roadbed, and that those PCB's will leach and contaminate aquifers or waterways. Nothing in the Carman and Sinclair affidavits suggest that any of these predicate events are likely to occur.

Even if we assume that road construction will occur over the Edwards aquifer, nothing in Dr. Carman's affidavit suggests that the construction crews will likely use PCB Bulk Product Waste as road bed for those particular roads. Moreover, Sierra Club has failed to establish any likelihood that, when used as roadbed, PCB Bulk Product Waste will leach PCBs. Sierra Club does not assert that PCB bulk product waste disposed of as roadbed will come into contact with organic solvents, which trigger the leaching of PCB's to harmful levels. Thus, Sierra Club has presented no evidence that supports an inference that such PCB bulk product waste will leach harmful PCBs. Finally, Sierra Club has failed to present any affidavits or other evidence explaining how PCBs, once leached from roadbeds, could migrate into aquifers and waterways.

Unlike the petitioners in *Friends of the Earth* and *Cedar Point Oil*, petitioners in this case cannot show that they are likely to suffer any direct and concrete injury as a result of the PCB Mega Rule. As we have explained, the requirement that a party demonstrate a direct and concrete injury in fact "is designed to limit access to the courts to those who have a direct stake in the outcome, as opposed to those who would convert the judicial process into no more than a vehicle for

the value interests of concerned bystanders." *Cedar Point Oil*, 73 F.3d at 546 (internal citations and quotations omitted). Dr. Carman's subjective fears and speculative string of events cannot possibly serve as the basis for standing. *See Los Angeles v. Lyons*, 461 U.S. at 107, n.8, 103 S.Ct. at 1668 ("[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.") *See also Glickman*, 156 F.3d at 613 (injury must be concrete and particular); *cf. Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 1259-60, 140 L.Ed.2d 406 (1998)(holding, under closely related ripeness doctrine, that Texas had not presented a justiciable claim because the proposed harm depended on the occurrence of numerous uncertain future events).

C

Airborne

Sinclair hypothesizes that she will be injured by airborne, dust-centered PCBs that will be released into the environment during road construction. However, no evidence in the record, except Sinclair's subjective statement of belief, supports the conclusion that PCB bulk product wastes generate PCB-laden dust. There is also no evidence indicating that Sinclair uses or will be using a road that is built on roadbed containing PCB bulk product waste. Therefore, Sinclair has failed to establish that, as a result of EPA's alleged failure to adhere to the notice and comment requirements, she suffers or is likely to suffer an injury in fact.

D

Conclusion

We conclude that Sierra Club has failed to demonstrate an injury in fact sufficient to confer Article III standing. The Affiants simply do not allege concrete injuries or threats of injury to their recreational, aesthetic, or economic interests.

*Friends of the Earth*, —U.S.—, 120 S.Ct. at 705. The affidavits do not demonstrate that Sinclair and Carman are threatened with injury from PCB's to any greater extent than any other person in the United States who drives on the country's roadways and drinks water in a town that has landfills. Thus, Sierra Club has failed to allege that EPA's promulgation of Final Rules §§ 761.62(b) and (d) will result in any tangible injury to any of its members. Accordingly, we are without authority to consider Sierra Club's petition.

## VI

For the reasons stated above, we DISMISS USWAG and GE's petitions for review of EPA's PCB Mega-Rulemaking except for USWAG's challenge to Final Rule § 761.35 and GE's challenge to EPA's estimate of the toxicity of PCBs in §§ 761.61(a) and 761.67(b) [sic]. We REMAND § 761.35 to EPA in order to allow EPA to fully respond to comments and to explain why it did not grant a national variance for electric utilities. We REMAND §§ 761.61(a) and 761.79(b) to EPA so that it can complete its ongoing assessment of the non-cancer health effects of PCBs and reconsider the rule in light of this study. Because Sierra Club, through its members, has no standing to challenge the Final Rule we also DISMISS its petition for lack of jurisdiction.

**APPENDIX B**

[Filed Nov. 2, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 98-60495

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CENTRAL AND SOUTH WEST SERVICES, INC; ENTERGY SERVICES INCORPORATED; MISSISSIPPI POWER COMPANY; UTILITY SOLID WASTE ACTIVITIES GROUP
*Petitioners*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
*Respondent*

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No. 98-60642

GENERAL ELECTRIC COMPANY
*Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
*Respondent*

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No. 98-60804

SIERRA CLUB, a non-profit California Corporation
*Petitioner*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
*Respondent*

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Petitions for Review of an Order of the
Environmental Protection Agency

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*ON PETITIONS FOR REHEARING AND REHEARING EN BANC*

(opinion 8/15/00, 5 Cir., _____, _____ F.3d _____)

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Before DAVIS, CYNTHIA HOLCOMB HALL*, and SMITH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]

United States Circuit Judge

Chief Judge King, and Judges Wiener and Benavides did not participate in the consideration of the petitions for rehearing en banc.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

# APPENDIX C

## Section 6(e) of the Toxic Substances Control Act, codified at 15 U.S.C. § 2605(e)

### 15 U.S.C. § 2605. Regulation of hazardous chemical substances and mixtures

* * * *

(e) Polychlorinated biphenyls

(1) Within six months after January 1, 1977, the Administrator shall promulgate rules to—

(A) prescribe methods for the disposal of polychlorinated biphenyls, and

(B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

Requirements prescribed by rules under this paragraph shall be consistent with the requirements of paragraphs (2) and (3).

(2)(A) Except as provided under subparagraph (B), effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

(B) The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use (or combination of such activities) will not present an unreasonable risk of injury to health or the environment.

(C) For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.

(3)(A) Except as provided in subparagraphs (B) and (C)—

(i) no person may manufacture any polychlorinated biphenyl after two years after January 1, 1977, and

(ii) no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date.

(B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such an exemption if the Administrator finds that—

(i) an unreasonable risk of injury to health or environment would not result, and

(ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl.

An exemption granted under this subparagraph shall be subject to such terms and conditions as the Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.

(C) Subparagraph (A) shall not apply to the distribution in commerce of any polychlorinated biphenyl if such polychlorinated biphenyl was sold for purposes other than resale before two and one half years after October 11, 1976.

(4) Any rule under paragraph (1), (2)(B), or (3)(B) shall be promulgated in accordance with paragraphs (2), (3), and (4) of subsection (c) of this section.

(5) This subsection does not limit the authority of the Administrator, under any other provision of this chapter or any other Federal law, to take action respecting any polychlorinated biphenyl.

(Pub.L. 94-469, Title I, § 6, Oct. 11, 1976, 90 Stat. 2020; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

## Section 18 of the Toxic Substances Control Act, codified at 15 U.S.C. § 2617

### 15 U.S.C. § 2617. Preemption

(a) Effect on State law

(1) Except as provided in paragraph (2), nothing in this chapter shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture.

(2) Except as provided in subsection (b) of this section—

(A) if the Administrator requires by a rule promulgated under section 2603 of this title the testing of a chemical substance or mixture, no State or political subdivision may, after the effective date of such rule, establish or continue in effect a requirement for the testing of such substance or mixture for purposes similar to those for which testing is required under such rule; and

(B) if the Administrator prescribes a rule or order under section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title) which is applicable to a

chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act [42 U.S.C. § 7401 et seq.] or any other Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

(b) Exemption

Upon application of a State or political subdivision of a State the Administrator may by rule exempt from subsection (a)(2) of this section, under such conditions as may be prescribed in such rule, a requirement of such State or political subdivision designed to protect against a risk of injury to health or the environment associated with a chemical substance, mixture, or article containing a chemical substance or mixture if—

(1) compliance with the requirement would not cause the manufacturing, processing, distribution in commerce, or use of the substance, mixture, or article to be in violation of the applicable requirement under this chapter described in subsection (a)(2) of this section, and

(2) the State or political subdivision requirement (A) provides a significantly higher degree of protection from such risk than the requirement under this chapter described in subsection (a)(2) of this section and (B)

does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce.

(Pub.L. 94-469, Title I, § 18, Oct. 11, 1976, 90 Stat. 2038; renumbered Title I, Pub.L. 99-519, § 3(c)(1), Oct. 22, 1986, 100 Stat. 2989.)

## Section 19 of the Toxic Substances Control Act, codified at 15 U.S.C. § 2618

### 15 U.S.C. § 2618. Judicial review

(a) In general

(1)(A) Not later than 60 days after the date of the promulgation of a rule under section 2603(a), 2604(a)(2), 2604(b)(4), 2605(a), 2605(c) or 2607 of this title, or under subchapter II or IV of this chapter, any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

(B) Courts of appeals of the United States, shall have exclusive jurisdiction of any action to obtain judicial review (other than in at enforcement proceeding) of an order issued under subparagraph (A or (B) of section 2605(b)(1) of this title if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

(2) Copies of any petition filed under paragraph (l)(A) shall be transmitted forthwith to the Administrator and to the Attorney General by the clerk of the court with which such petition was filed. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of

proceedings on which the Administrator based the rule being reviewed under this section and to the transfer of proceedings between United States courts of appeals.

(3) For purposes of this section, the term "rulemaking record means—

(A) the rule being reviewed under this section;

(B) in the case of a rule under section 2603(a) of this title, the finding required by such section, in the case of a rule under section 2604(b)(4) of this title, the finding required by such section, in the case of a rule under section 2605(a) of this title the finding required by section 2604(f) or 2605(a) of this title, as the case may be, in the case of a rule under section 2605(a) at this title, the statement required by section 2605(c)(1) of this title, and in the case of a rule under section 2605(e) of this title the findings required by paragraph (2)(B) or (3)(B) of such section, as the case may be[1] and in the case of a rule under subchapter IV of this chapter, the finding required for the issuance of such a rule;

(C) any transcript required to be made of oral presentations made in proceedings for the promulgation of such rule;

(D) any written submission of interested parties respecting the promulgation of such rule; and

(E) any other information which the Administrator considers to be relevant to such rule and which the Administrator identified, on or before the date of the promulgation of such rule, in a notice published in the Federal Register.

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[1] So in original. Probably should be followed by a comma.

(b) Additional submissions and presentations; modifications

If in an action under this section to review a rule the petitioner or the Administrator applies to the court for leave to make additional oral submissions or written presentations respecting such rule and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Administrator, the court may order the Administrator to provide additional opportunity to make such submissions and presentations. The Administrator may modify or set aside the rule being reviewed or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(c) Standard of review

(l)(A) Upon the filing of a petition under subsection (a)(l) of this section for judicial review of a rule, the court shall have jurisdiction (i) to grant appropriate relief, including interim relief, as provided in chapter 7 of Title 5, and (ii) except as otherwise provided in subparagraph (B), to review such rule in accordance with chapter 7 of Title 5.

(B) Section 706 of Title 5 shall apply to review of a rule under this section, except that—

> (i) in the case of review of a rule under section 2603(a), 2604(b)(4), 2605(a), or 2605(e) of this title, the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record (as defined in subsection (a)(3) of this section) taken as a whole;

(ii) in the case of review of a rule under section 2605(a) of this title, the court shall hold unlawful and set aside such rule if it finds that—

(I) a determination by the Administrator under section 2605(c)(3) of this title that the petitioner seeking review of such rule is not entitled to conduct (or have conducted) cross-examination or to present rebuttal submissions, or

(II) a rule of, or ruling by, the Administrator under section 2605(c)(3) of this title limiting such petitioner's cross examination or oral presentations,

has precluded disclosure of disputed material facts which was necessary to a fair determination by the Administrator of the rulemaking proceeding taken as a whole; and section 706(2)(D) shall not apply with respect to a determination, rule, or ruling referred to in subclause (I) or (II); and

(iii) the court may not review the contents and adequacy of—

(I) any statement required to be made pursuant to section 2605(c)(1) of this title, or

(II) any statement of basis and purpose required by section 553(c) of Title 5, to be incorporated in the rule

except as part of a review of the rulemaking record taken as a whole.

The term "evidence" as used in clause (i) means any matter in the rulemaking record.

(C) A determination, rule, or ruling of the Administrator described in subparagraph (B)(ii) may be reviewed only in an action under this section and only in accordance with such subparagraph.

(2) The judgment of the court affirming or setting aside, in whole or in part, any rule reviewed in accordance with this

section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(d) Fees and costs

The decision of the court in an action commenced under subsection (a) of this section, or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

(e) Other remedies

The remedies as provided in this section shall be in addition to and not in lieu of any other remedies provided by law.

(Pub.L. 94-469, Title I, § 19, Oct. 11, 1976, 90 Stat. 2039; renumbered Title I and amended Pub.L. 99-519, § 3(b)(2), (c)(1), Oct. 22, 1986, 100 Stat. 2989; Pub.L. 102-550, Title X, § 1021(b)(8), Oct. 28, 1992, 106 Stat. 3923.)

# APPENDIX D

## STATUTES PROVIDING FOR IMMEDIATE JUDICIAL REVIEW OF NEW RULES

Set Forth In The Order Of Appearance
In The United States Code

## FEDERAL TRADE COMMISSION ACT

### 15 U.S.C. § 57a. Unfair or deceptive acts or practices rulemaking proceedings

* * * *

(e) Judicial review; petition; jurisdiction and venue; rulemaking record; additional submissions and presentations; scope of review and relief; review by Supreme Court; additional remedies

(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person . . . may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. . . .

* * * *

## SECURITIES EXCHANGE ACT

### 15 U.S.C. § 78y. Court review of orders and rules

* * * *

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission . . . may obtain review of this rule in the United States

Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

* * * *

## FEDERAL ENERGY ADMINISTRATION AUTHORIZATION ACT OF 1977

### 15 U.S.C. § 766. Administrative provisions

* * * *

(c) Judicial review of administrative rulemaking; filing of petition in United States Court of Appeals

Judicial review of administrative rulemaking of general and national applicability done under this chapter . . . may be obtained only by filing a petition for review in the United States Court of Appeals for the District of Columbia within thirty days from the date of promulgation of any such rule, regulation, or order . . . .

* * * *

## FLAMMABLE FABRICS ACT

### 15 U.S.C. § 1193. Flammability standards or regulations

* * * *

(e) Judicial review; additional information before Commission; applicability of sections 701 to 706 of Title 5; finality of judgment; survival of action

(1) Any person who will be adversely affected by any such standard or regulation or amendment thereto when it is effective may at any time prior to the sixtieth day after such standard or regulation or amendment thereto is issued file a petition with the United States court of appeals for the circuit

wherein such person resides or has his principal place of business, for a judicial review thereof. . . .

* * * *

## CONSUMER PRODUCT SAFETY ACT

### 15 U.S.C. § 2060. Judicial review of consumer product safety rules

(a) Petition by persons adversely affected, consumers, or consumer organizations

Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia, or for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule. . . .

* * * *

## TOXIC SUBSTANCE CONTROL ACT

### 15 U.S.C. § 2618. Judicial review

(a) In general

(1)(A) Not later than 60 days after the date of the promulgation of a rule . . . any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of

such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

* * * *

## FISHERY-CONSERVATION AND MANAGEMENT ACT OF 1976

### 16 U.S.C. § 1855. Other requirements and authority

* * * *

(f) Judicial review

(1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable . . . .

* * * *

## FEDERAL FOOD, DRUG, AND COSMETIC ACT

### 21 U.S.C. § 346a. Tolerances and exemptions for pesticide chemical residues

* * * *

(h) Judicial review

(1) Petition.

In a case of actual controversy as to the validity of any regulation issued under . . . this section, or any regulation that is the subject of such an order, any person who will be adversely affected by such order or regulation may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein that person resides or has its principal place of business, or in the United States Court of Appeals for

the District of Columbia Circuit, within 60 days after publication of such order or regulation, a petition praying that the order or regulation be set aside in whole or in part.

* * * *

**21 U.S.C. § 360g. Judicial review**

(a) Petition; record

Not later than thirty days after –

(1) the promulgation of a regulation under section 360c of this title . . .

(2) the promulgation of a regulation under section 360d of this title . . .

(4) the promulgation of a regulation under paragraph (3) of section 360e(b) of this title . . .

(5) the promulgation of a regulation under section 360f of this title [or] . . .

(9) a regulation under section 360e(i)(2) or 360j(l)(5)(B) of this title,

any person adversely affected by such regulation . . . may file a petition with the United States Court of Appeals for the District of Columbia or for the circuit wherein such person resides or has his principal place of business for judicial review of such regulation or order. . . .

* * * *

**TITLE 28, CHAPTER 158 – ORDERS OF FEDERAL AGENCIES; REVIEW**

**28 U.S.C. § 2342. Jurisdiction of court of appeals**
***[note: must be read together with § 2344, infra]***

The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . .

(3) all rules, regulations, or final orders of –

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 . . . or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to –

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d)[2] . . .

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title . . . .

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

**28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. . . .

* * * *

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[2] So in original. Probably should be followed by a closing parenthesis.

## SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

### 30 U.S.C. § 1276. Judicial review

(a) Review by United States District Court; venue; filing of petition; time

(1) . . . Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. . . .

* * * *

## CLEAN WATER ACT

### 33 U.S.C. § 1369. Administrative procedure and judicial review

* * * *

(b) Review of Administrator's action; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title . . . (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title . . . (E) in approving or promulgating any

effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title . . . and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

* * * *

## OIL POLLUTION ACT OF 1990

### 33 U.S.C. § 2717. Litigation, jurisdiction, and venue

(a) Review of regulations

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

* * * *

## SAFE DRINKING WATER ACT

### 42 U.S.C. § 300j-7. Judicial review

(a) Courts of appeals; petition for review; actions respecting regulations; filing period; grounds arising after expiration of filing period; exclusiveness of remedy

A petition for review of –

(1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and

(2) any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought . . . .

* * * *

## THE PUBLIC HEALTH SERVICE ACT

### 42 U.S.C. § 300aa-32. Judicial review

A petition for review of a regulation under this part may be filed in a court of appeals of the United States within 60 days from the date of the promulgation of the regulation or after such date if such petition is based solely on grounds arising after such 60th day.

## ATOMIC ENERGY ACT OF 1954

### 42 U.S.C. § 2022. Health and environment standards for uranium mill tailings

* * * *

(c) Publication in Federal Register; notice and hearing; consultations; judicial review; time for petition; venue; copy to Administrator; record; administrative jurisdiction; review by Supreme Court; effective date of rule

* * * *

(2) Judicial review of any rule promulgated under this section may be obtained by any interested person only upon such person filing a petition for review within sixty days after such promulgation in the United States court of appeals for the Federal judicial circuit in which such person resides or has his principal place of business. . . .

* * * *

## NOISE CONTROL ACT

### 42 U.S.C. § 4915. Judicial review

(a) Petition for review

A petition for review of action of the Administrator of the Environmental Protection Agency in promulgating any standard or regulation . . . may be filed only in the United States Court of Appeals for the District of Columbia Circuit, and a petition for review of action of the Administrator of the Federal Aviation Administration in promulgating any standard or regulation under section 1431 of Title 49 Appendix may be filed only in such court. Any such petition shall be filed within ninety days from the date of such promulgation, or after such date if such petition is based solely on grounds arising after such ninetieth day. . . .

* * * *

## ENERGY POLICY AND CONSERVATION ACT

### 42 U.S.C. § 6306. Administrative procedure and judicial review

* * * *

(b) Petition by persons adversely affected by rules; effect on other laws

(1) Any person who will be adversely affected by a rule prescribed under section 6293, 6294, or 6295 of this title may, at any time within 60 days after the date on which such rule is prescribed, file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. . . .

* * * *

## RESOURCE CONSERVATION AND RECOVERY ACT

### 42 U.S.C. § 6976. Judicial review

(a) Review of final regulations and certain petitions

Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5, except that –

(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or

after such date if such petition for review is based solely on grounds arising after such ninetieth day . . . .

* * * *

## CLEAN AIR ACT

### 42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) . . . any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. . . .

* * * *

## COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

### 42 U.S.C. § 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. . . .

* * * *

## PIPELINE SAFETY ACT OF 1992

### 49 U.S.C. § 60119. Judicial review

(a) Review of regulations and waiver orders

(1) . . . [A] person adversely affected by a regulation prescribed under this chapter or an order issued about an application for a waiver under section 60118(c) or (d) of this title may apply for review of the regulation or order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 89 days after the regulation is prescribed or order is issued. . . .

* * * *

## APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 98-60495
(consolidated with Nos. 98-60642 & 98-60804)

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CENTRAL AND SOUTH WEST SERVICES, INC., ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY, AND THE UTILITY SOLID WASTE ACTIVITIES GROUP,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

---

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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BRIEF OF PETITIONERS CENTRAL AND SOUTH WEST SERVICES, INC., ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY, AND THE UTILITY SOLID WASTE ACTIVITIES GROUP,

---

Respectfully Submitted:

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Dated: April 27, 1999

[Pages 27-28]

* * * *

Petitioners' preemption challenge presents a pure legal issue: whether TSCA Section 18 preempts state and local PCB disposal regulations that are more stringent than those promulgated by EPA under TSCA Section 6(e). Because this is a pure question of law that can be readily resolved without further factual development, the issue is ripe for review. *See American Forest and Paper Ass'n. v. EPA*, 137 F.3d 291, 296-297 (5th Cir. 1998) (pure legal question of EPA's statutory authority under the federal Clean Water Act ripe for review); *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir. 1993) (a case is ripe for review if the only remaining question is a legal one). Moreover, the threat of applicability of more stringent state and local PCB disposal regulations is concrete and real: there exist a number of state PCB standards that are more stringent than those set forth in

the federal PCB Mega Rule.[11] [Page 28] The pure legal preemption issues are also plainly grounded in the facts.

Finally early resolution of Petitioners' claims will avoid confusion and possible serious disruption to Congress' mandate for a comprehensive and uniform national PCB cleanup and disposal program. *See Chemical Waste Management*, 869 F.2d at 1534 (no purpose served by delaying resolution of issue when agency has issued final pronouncement on subject that is "likely to impose some immediate consequences on petitioners."). There are many sites across the country that are undertaking, or planning to undertake, PCB cleanup and disposal activities. Unless the Court decides whether TSCA preempts competing and more stringent state and local PCB disposal laws, resolution of this issue will be battled on a state-by-state, case-by-case basis, which would pose tremendous burdens on Petitioners and unnecessarily tax judicial resources nationwide. This situa-

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[11] For example, in the final rule under review, EPA established cleanup and disposal standards for PCB remediation wastes that allow certain levels of PCBs to remain on-site after cleanup and authorizes the disposal of such wastes containing prescribed amounts of PCBs in municipal solid waste landfills. *See e.g.*, 63 Fed. Reg. at 35449 (codified at 40 C.F.R. 761.61(a)(4)(i)(B)(1)), R.A1-004 (setting forth cleanup standards of $\leq$ 25 ppm for PCB remediation wastes in industrial settings ("low occupancy" areas)). Compare the federal PCB soil limit in industrial settings of $\leq$ 25 ppm to the Texas risk reduction standard of 10 ppm for industrial settings (30 TEX. ADMIN. CODE § 335.568); the Louisiana risk evaluation standard of 11 ppm for industrial settings (Louisiana Dept. of Environmental Quality, Corrective Action Group, *Risk Evaluation Program* (Dec. 20, 1998) <www.deq.state.la.us/olae/irdd/recapdoc.htm>); the Massachusetts risk base standard of 2 ppm of PCBs in soil regardless of human exposure potential (MASS. REGS. CODE 310 §§ 40.0975, 40.0985); the New York standard of 1.0 ppm (surface) and 10 ppm (subsurface) (Memorandum from Michael O'Toole, Director, Div. of Hazardous Waste Remediation to Regional Haz. Waste Remediation Engineers, *et al.*, "Technical and Administrative Guidance Memorandum," (January 24, 1994)); and the Washington soil cleanup standards for industrial properties of 10.0mg/kg (WASH. ADMIN. CODE § 173-340-745).

tion calls for prompt judicial resolution to avoid needless delays in the implementation of an important national program. Both Congressional and the public interest in prompt PCB cleanup and disposal will be greatly frustrated if these preemption issues must be resolved on a piecemeal basis.

* * * *